UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

02-M-107

v.

YAHYA GOBA,
SAHIM ALWAN,
SHAFAL MOSED,
YASEINN TAHER,
FAYSAL GALAB,

Defendants.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

02-M-108

v.

MUKHTAR AL-BAKRI,

Defendant.

DECISION AND ORDER

PREAMBLE

Understandably, the infamous, dastardly and tragic deeds and events of September 11, 2001 have caused a maelstrom of human emotions to be not only released but to also create a human reservoir of strong emotional feelings such as fear,

anxiety and hatred as well as a feeling of paranoia in many of the hearts and minds of the inhabitants of this great nation. These are strong emotions of a negative nature which, if not appropriately checked, cause the ability of one to properly reason to be impeded or to be blinded in applying our basic principles of law. In applying our democratic principles of law, the only blindness that is allowed and acceptable is that in which justice is blind to such things as a person's national origin or ethnic background or one's race or color or religious beliefs, because those characteristics play no role in deciding legal issues such as those that confront this Court today. If we truly believe in the principles espoused in this nation's Declaration of Independence and the United States Constitution, we must give more than lip service to those principles. We must fairly and fully apply those principles to each and every person entitled to their protection no matter how distasteful, frightening or loathsome it might be to some in doing so. We must always be vigilant to make certain that the rule of law, and not emotion, carries the day. There can be no doubt that the Constitution of the United States and our concepts of democracy provide sufficient strength and protection to bring citizens to justice without weakening our security. We must never adopt an "end justifies the means" philosophy by claiming that our Constitutional and democratic principles must be temporarily furloughed or put on hold in cases involving alleged terrorism in order to preserve our democracy. To do so, would result in victory for the terrorists.

PRELIMINARY STATEMENT

This is indeed a unique case and one of first impression. The defendants

herein are charged in a criminal complaint with having violated Title 18 U.S.C. §§ 2339B and 2. The defendants Goba, Alwan, Mosed, Taher and Galab had their initial appearance on the aforesaid complaint on September 14, 2002, and at that time, the government moved to have the defendants detained on the basis that they constitute a danger to the community and were a risk for flight.

The defendant Al-Bakri had his initial appearance on a separate complaint containing the same charges on September 16, 2002, and the government moved for his detention on the same grounds.

All of the defendants requested the Court to appoint counsel to represent them at taxpayers' expense, and this was done.[1]

Thereafter, the government renewed its motion to have all of the defendants herein detained on the basis that each defendant constituted a danger to the community and was a risk of flight. Each defendant, by his counsel, objected to detention and has requested the Court to release him on bail subject to suggested conditions. The defendants filed a "Joint Memorandum Of Law In Opposition To Detention Motion" on September 18, 2002 and a "Joint Supplemental Memorandum Of Law In Opposition To Detention Motion" was filed on September 19, 2002. A detention hearing was held, and both the government and the defense have presented their

[1] Joseph Latona, Esq. was conditionally assigned to represent the defendant Galab until such time as a determination was made as to whether he would be retained by the defendant.

positions and support of their positions by proffer. The hearing itself was conducted over a number of days, to wit, September 18, 19, and 20, 2002 and October 3, 2002. Counsel for the government filed a "Memorandum And Proffer In Support Of Pre-Trial Detention" on September 27, 2002 along with an affidavit of Assistant United States Attorney William J. Hochul, Jr. sworn to September 27, 2002 in further support of the government's motion. Counsel for the defendants filed another "Joint Memorandum Of Law In Opposition To The Government's Motion for Detention" on September 27, 2002, and individual filings were made on behalf of the defendants Goba, Alwan, Mosed, Galab, Taher and Al-Bakri on September 27, 2002. However, because of the government's additional filings asserting new information on September 27, 2002, counsel for the defendants requested an opportunity to respond to the content of those filings as part of the public hearing, which request was granted, and the matter was scheduled for October 3, 2002. On October 2, 2002, Assistant United States Attorney Martin J. Littlefield filed two separate affidavits sworn to on October 2, 2002, one of which modified the September 27, 2002 affidavit of Assistant United States Attorney Hochul with respect to quoted recitations from an audio cassette tape entitled "Koranic Recitations." The other was submitted in further support of the government's motion for detention and set forth additional information about the alleged travel arrangements of the defendants Taher, Galab and Mosed in April 2001.

Upon completion of the defendants' further proffers and the government's rebuttal to same on October 3, 2002, the matter was taken under advisement by the Court, and the following constitutes this Court's decision with respect to the

government's motion to detain the defendants and each defendant's application to be released on bail.

DISCUSSION AND ANALYSIS

At the outset, counsel for the defendants objected to the government's proceeding by proffer and requested that the government be required to offer testimony along with documentary evidence in support of this motion. This joint objection and request by the defendants was overruled and denied, and the Court allowed all parties to proceed by proffer.

> It is well established in this circuit that proffers are permissible both in the bail determination and bail revocation contexts.

United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000). *See also United States v. Davis*, 845 F.2d 412, 415 (2d Cir. 1988).

The government's motion to detain the defendants herein is based on its claim that each defendant is charged with a crime of violence, to wit, with having violated 18 U.S.C. § 2339B and therefore, each defendant constitutes a danger to the community and a risk for flight.

> The Bail Reform Act limits the circumstances under which a district court may order pretrial detention. *See United States v. Salerno*, ___ U.S. ___, 107 S.Ct. 2095, 2102, 95 L.Ed.2d 697 (1987). A motion seeking such detention is permitted only when the charge is for certain enumerated crimes, 18 U.S.C. § 3142(f)(1) (crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or felonies committed by certain repeat offenders), or when there is a serious

> risk that the defendant will flee, or obstruct or attempt to obstruct justice. *Id.* § 3142(f)(2).
>
> After a motion for detention has been filed, the district court must undertake a two-step inquiry. *See United States v. Shakur*, 817 F.2d 189, 194 (2d Cir. 1987). It must first determine by a preponderance of the evidence, *see United States v. Jackson*, 823 F.2d 4, 5 (2d Cir. 1987) that the defendant either has been charged with one of the crimes enumerated in Section 3142(f)(1) or that the defendant presents a risk of flight or obstruction of justice. Once this determination has been made, the court turns to whether any condition or combination of conditions of release will protect the safety of the community and reasonably assure the defendant's appearance at trial. *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir.), *cert. dismissed*, ___ U.S. ___, 107 S.Ct. 562, 93 L.Ed.2d 568 (1986).

United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988).

During the course of the proffer on behalf of the government, counsel for the government attempted to activate the presumption "that no condition or combination of conditions will reasonably assure the appearance of the [defendants] as required and the safety of the community" pursuant to § 3142(e) of the Bail Reform Act because each defendant was allegedly involved in an offense covered under section 924(c) of Title 18 U.S.C. This argument is based on the government's proffer that each defendant was engaged in training at a terrorist training camp in Afghanistan and instructed in the use of a Kalashnikov rifle and other types of weaponry and that each defendant participated in the use of such weaponry.

Title 18 U.S.C. § 924(c) provides:

> (C)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -
>
> * * *

The government argues that since the defendants are charged with a crime of violence, to wit, 18 U.S.C. § 2339B, and since they were "using or carrying firearms" (Kalashnikov rifle and long distance rifles) in furtherance of "providing material support" to a terrorist organization, the aforesaid presumption under § 3142(e) applies.

I find this argument to be without legal merit and therefore reject it for the following reasons. As previously stated, each of the defendants herein is charged in a criminal complaint with having violated 18 U.S.C. §§ 2339B and 2. None of them are charged in any way with having violated 18 U.S.C. § 924(c). The clear holding in *United States v. Chimurenga* disposes of the government's argument:

> The plain language of the statue and the legislative history shows that the presumption

> was intended to arise **only after a defendant has been charged with the particular offense** by a valid complaint or indictment. . . . To hold that the rebuttable presumption comes into play prior to a formal charge would rip the fabric of the statute's carefully sewn procedural safeguards. *See United States v. Payden*, 759 F.2d 202, 205 (2d Cir. 1985).

760 F.2d 400, 405 (2d Cir. 1985) (emphasis added).

Therefore, it is incumbent upon the government to support its claim that each defendant constitutes a danger to the community by "clear and convincing evidence." *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991); *United States v. Martir*, 782 F.2d 1141, 1147 (2d Cir. 1986); *Chimurenga,* 760 F.2d at 403; 18 U.S.C. § 3142(f).

However, before addressing the issue of what constitutes "clear and convincing evidence" in support of the government's claim, a determination must first be made as to whether Title 18 U.S.C. § 2339B constitutes a crime of violence so as to provide a legal basis for the government's motion to detain any of these defendants. *See* 18 U.S.C. § 3142(f)(1)(A). The defendants argue that 18 U.S.C. § 2339B does not *per se* constitute a crime of violence since "it does not contain an element of physical force, its use, attempted or threatened" and that it does not meet any of the definitions set forth in 18 U.S.C. § 3156(a)(4) subsections A, B and C. Defendants' Joint Memorandum Of Law In Opposition To The Government's Motion For Detention ("Defendants' Joint Memorandum") at

p. 7.

> In the task of interpretation of a statute, a court must be disinterested so that it may fairly ascertain Congressional purpose and policy, and must avoid treating the words used in the statute as "empty vessels" into which meaning can be poured.

Chimurenga, 760 F.2d at 403.

Title 18 U.S.C. § 3156(a)(4)(B) defines a "crime of violence" as:

> any other offense that is a felony and that **by its nature**, involves a **substantial risk** that physical force against the person or property of another **may** be used in the course of committing the offense (emphasis added).

The defendants are charged with having violated 18 U.S.C. § 2339B by "provid[ing] material support or resources to a foreign terrorist organization, or attemp[ing] or conspir[ing] to do so. . . ." Section 2339B(g)(6) defines a "terrorist organization" by reference, to wit, Title 8 U.S.C. § 1182(a)(3)(B)(vi), which defines a "terrorist organization" as follows:

> [T]he term "terrorist organization" means an organization –
>
> . . .
>
> (III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II) or (III) of clause (iv).

8 U.S.C. § 1182(a)(3)(B)(iii) defines "terrorist activity" in part as follows:

> As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
>
> . . .
>
> (V) The use of any –
>
> . . .
>
> (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),
>
> with intent to endanger, directly **or indirectly**, the safety of one or more individuals or to cause substantial damage to property (emphasis added).

Title 22 U.S.C. § 2656f(d)(2) and (3) define "terrorism" and "terrorist group" as follows:

> (2) the term "terrorism" means premeditated, politically motivated **violence** perpetrated against noncombatant targets by subnational groups or **clandestine** agents; and
>
> (3) the term "terrorist group" means any group practicing, or which has significant subgroups which practice, international terrorism (emphasis added).

In applying the aforesaid definitions and the concepts to which they related, I conclude that 18 U.S.C. § 2339B constitutes a crime of violence.

> It takes little imagination to conclude that providing material support and resources to a

> terrorist organization creates a substantial risk that the violent aims of the terrorists will be realized. Violence, therefore, is intrinsic to the crimes with which [the defendants are] charged.

United States v. Lindh, 212 F. Supp.2d 541, 580 (E.D.Va. 2002).

As stated earlier, the defendants are charged with conspiring to violate 18 U.S.C. § 2339B by their alleged actions as a group.

> The existence of a criminal grouping increases the chances that the planned crime will be committed beyond that of a mere possibility. Because the conspiracy itself provides a focal point for collective criminal action, attainment of the conspirators' objectives becomes instead a significant *probability*. Thus, ascribing an ordinary meaning to the words, a conspiracy to commit an act of violence is an act involving a "substantial risk" of violence.

Chimurenga, 760 F.2d at 404 (internal citation omitted).

Therefore, I find that the requirement of 18 U.S.C. § 3142(f)(1)(A) has been met.

In order to prevail on its motion for detention of the defendants, the government has the burden of establishing by "clear and convincing evidence" that each defendant constitutes a danger to the community and therefore should not be allowed pretrial release since there are no conditions or combination of conditions that could be imposed to "reasonably assure the appearance of [the defendant] as required and the safety of any other person and the community."

However, the government is **not** required to present "a record of violence or dangerous conduct" by each defendant "in order to justify detaining a defendant on grounds of dangerousness." *Rodriguez*, 950 F.2d at 89. Although a prior record of violence eases the government's burden of showing dangerousness, **it is not essential**. The government's burden is only to prove dangerousness by clear and convincing evidence." *Id.* (emphasis added). *See also LaFontaine*, 210 F.3d at 134; *United States v. Ferranti*, 66 F.3d 540, 543 (2d Cir. 1995).

The Bail Reform Act of 1984 requires the Court, in considering whether bail should be granted to a defendant, "to consider properly 'the **nature and seriousness of the danger to . . . the community** that would be posed by the person's release . . . .'" *Rodriguez*, 950 F.2d at 89 (emphasis added).

"Clear and convincing evidence" has been defined in a number of different settings, *i.e.*, in cases involving civil litigation as well as in criminal cases. Nevertheless, there appears to be a generally accepted definition which is as follows:

> The clear and convincing standard of proof has been variously defined . . . as evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 285 n.11 (1990) (alteration in original)

(internal quotation omitted).

In an earlier civil case involving the states of Colorado and New Mexico over water rights, the United States Supreme Court stated that the clear and convincing evidence standard is one which "place[s] in the ultimate factfinder an abiding conviction that the truth of [the proponent's] factual contentions are 'highly probable.'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

The United States Court of Appeals for the Second Circuit has described

> clear and convincing evidence with respect to a defendant's danger to the community required by § 3142(f)(2)(B) [as being] something more than "preponderance of the evidence," and something less than "beyond a reasonable doubt." To find danger to the community under this standard of proof requires that the evidence support such a conclusion with a high degree of certainty.

Chimurenga, 760 F.2d at 405.

Finally, Black's Law Dictionary, Seventh Edition defines "clear and convincing evidence" as follows:

> Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

I point out and emphasize that "[t]he function of a standard of proof is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979), *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

Because of the length of the detention hearing herein, and the voluminous nature of the proof proffered by counsel for the government and each of the defendants, I have prepared an attachment to the Decision and Order, which is incorporated herein by reference, containing a synopsis of the proof proffered by the government in support of its motion to detain the defendants, and the proof proffered on behalf of each defendant in opposition to the motion and in further support of each defendant's application to be released on bail. However, the evidence proffered that I have considered crucial in making my decision is referenced within the body of this Decision and Order.

I find that the government's exhibits proffered at the detention hearing, consisting of airline boarding passes for the defendants Mosed, Taher and Galab, and the passport entries for the defendant Mosed, along with the United States Customs Report for those three defendants, establish in a clear and convincing way that defendants Mosed, Taher and Galab left JFK Airport on April 28, 2001 on Pakistan International Airline's Flight Number 712Y bound for the ultimate destination of Lahore,

Pakistan and that they arrived at that destination on April 29, 2001; that they exited Lahore, Pakistan on June 27, 2001 and arrived at JFK Airport on June 27, 2001. I further find that each of these defendants paid the sum of $1,309.20 in cash for their airline tickets for this trip.

As to the defendants Goba, Alwan and Al-Bakri, I find that the statements given by Alwan and Al-Bakri are credible for purposes of this Decision and Order when considered in the context of the total evidence proffered herein. More specifically, the passports of Alwan and Goba offered by the government at the hearing establish that entry visas were issued to them by the Islamic Republic of Pakistan having a duration period of "three months." Alwan's passport indicates an entry at Karachi, Pakistan on May 14, 2001 and a departure from Karachi, Pakistan on June 20, 2001. The entry date in the Goba passport exhibit is blurred, but it contains an exit stamp from Karachi, Pakistan on August 2, 2001.

In his statement to the F.B.I., Alwan states that Goba "obtained the visas for Al-Bakri and [himself]." T. 394.[2] Al-Bakri in his statement to the F.B.I. states that Goba was "the leader of the group during [the group] trip to Pakistan and Afghanistan" and that Goba was the "emir of the group and collected money from [him] for the trip before they left Lackawanna, New York." T. 394.

[2] References are to the Transcript of the Detention Hearing held on September 18, 19 and 20 and October 3, 2002.

Alwan further states that he, Goba and Al-Bakri stayed in Karachi, Pakistan for approximately one week, at which time they met Conspirator A. T. 67. From Karachi, Pakistan, they flew to Quetta, Pakistan where they stayed at the guest house for a period of time. T. 68. From Quetta, they were transported to another guest house in Kandahar, Afghanistan where all three stayed for a week. T. 68-69. While at this guest house, all three received "indoctrination and training by al-Qaida members and other persons affiliated with the al-Qaida terrorist network." T. 69. They were shown, among other things, a movie about the destruction of the USS Cole and how al-Qaida committed that particular terrorist act. There were also conversations about Palestine and Kashmir, and they "were provided with anti-American indoctrination and anti-American sentiments." T. 69.

The defendant Al-Bakri corroborates the substance of the statement given by Alwan to the F.B.I. Al-Bakri, in his statement, has stated that "the leader of the whole trip from Buffalo into the al-Farooq training camp was defendant Goba." T. 104. He admitted having traveled to Karachi, Pakistan along with defendants Goba and Alwan and traveling to Quetta, Pakistan from there. He states that the trip to Quetta was by air and that this trip "was paid for by the people who ran the guest house in Quetta." T. 98. He further "acknowledged driving to Kandahar, going to a guest house there and viewing the movie about the USS Cole." T. 98.

Both Alwan and Al-Bakri have admitted to traveling to a "training camp" some distance from Kandahar, Afghanistan. Alwan called the camp Taseesy, but Al-

Bakri states that it was the al-Farooq training camp of al-Qaida. In any event, both of these defendants have stated that while at the training camp, they saw and interacted with the defendants Goba, Mosed, Taher and Galab who were there all at the same time. Al-Bakri further stated that "while in the Kandahar guest house he was given a uniform" which he "wore at the al-Farooq camp on every day but Friday." T. 98. While at this camp, Al-Bakri states that he had contact with the defendants Galab, Taher and Mosed whom he knows as "Shafal." T. 103. Al-Bakri also "indicated that while he was at the al-Farooq training camp, he considered himself to be a member of al-Qaida." T. 103. Both defendants Alwan and Al-Bakri also stated that while all six defendants were at the al-Farooq training camp, Usama bin Laden spoke to the attendees at the camp.

Alwan states that Usama bin Laden gave his speech "on approximately the eighth day of the Taseesy camp" and that bin Laden spoke about an "alliance of the Islamic Jihad and al-Qaida" and that he "mentioned how important it is to train and fight for the cause of Islam." Alwan stated that bin Laden also "espoused anti-American and anti-Israeli statements." T. 91.

Al-Bakri has stated that in the speech given by bin Laden at the al-Farooq camp which he attended along with the other five defendants, bin Laden spoke "about the need to prepare and train" because "there was going to be a fight against Americans." T. 103-104.

Based on the statements of Alwan and Al-Bakri, as well as the aforesaid

travel documents, I find that the "training period" at the al-Farooq camp was to be for five weeks and that with the exception of Alwan, all the defendants remained at that camp for the five week period. Al-Bakri has admitted to staying an additional week at the camp. T. 104. He further states that after he did leave the camp, he met up with the defendant Goba in Kandahar. T. 104. He also corroborates Alwan's claim that he, Alwan, left the camp early. Alwan states that he left the training camp "on the tenth day" of his stay there and that he returned to Kandahar and then to Quetta. T. 201.

While at the al-Farooq training camp, all of the defendants were given code names and were given training in the use of explosives. The al-Farooq training camp was "dedicated to producing and training terrorist fighters for the al-Qaida cause." T. 72-74.

The defendant Alwan has also "admitted being lectured by several people at the Kandahar guest house on topics such as jihad and the justification for using suicide as a weapon." T. 95.

One of the documents (Defendant Taher's Exhibit 4) seized from a residence of the defendant Taher pursuant to a search warrant issued by this Court, consists of a lengthy dissertation on the justification of suicide as a form of "martyrdom" under Islam. Counsel for the defendant Taher argues that the document was obtained and retained as an educational reference and consists of nothing more than a comparison of differing theological or philosophical views on the validity of suicide as a

means of supporting a cause. Although that may very well be the case, the document contains some disturbing statements. There is an interchange between the words "suicide" and "martyrdom" and self-destruction is valid if done as an act of "martyrdom" and may not be such if it is defined as "suicide." I find the following statements within Defendant Taher's Exhibit 4 to cause serious concern in the context of the issue before this Court:

> **Definition of Martyrdom Operations, and their Effect on the Enemy**
>
> Martyrdom or self-sacrifice operations are those performed by one or more people, against enemies far outstripping them in numbers and equipment, with prior knowledge that the operations will almost inevitably lead to death. The form this usually takes nowadays is to wire up one's body, or a vehicle or suitcase with explosives, and then to enter amongst a conglomeration of the enemy, or in their vital facilities, and to demonstrate in an appropriate place there in order to cause the maximum losses in the enemy ranks, taking advantage of the element of surprise and penetration. Naturally, the enacter of the operation will usually be the first to die.
>
> * * *
>
> **Verdicts of Scholars Concerning one who Attacks the Enemy Alone**
>
> Having established the permissibility of plunging into the enemy and attacking alone even when death is certain, we proceed and say that the martyrdom operations are derived from this principle, realizing that the prohibition of suicide relates to deficiency or absence of

faith. However, the former generations did not have knowledge of martyrdom operations in their current-day form, for these evolved with the changes in techniques of warfare, and hence they did not specifically address them. However, they did address similar issues, such as that of attacking the enemy single-handed and frightening them with one's own death being certain. They also deduced general principles under which the martyrdom operations fall, and in doing so they relied on evidence such as those we have mentioned in the previous section. There is one difference between the martyrdom operations and their classical precedent, namely that in our case the person is killed by his own hand, whereas in the other he was killed by the enemy. We also explain that this difference does not affect the verdict.

* * *

In fact, we see that this sort of operation was carried out in the presence of the Prophet, and after him by the Sahabah, not once but many times. Furthermore, protection of the religion is the greatest service a Mujahid performs, and the evidences do not leave us with any doubt that a Mujahid may sacrifice his life for the religion. Talhah shielded the Prophet with his hand, and this supports the permissibility of a person sacrificing himself for others in the interests of the religion.

E. Synopsis

It has transpired that scholars gave, to the issue of plunging single-handed into the enemy with reasonable certainty of being killed, the same verdict as in cases of death being certain, such that whoever permits the latter permits the former.

Further, the majority of scholars gave conditions for the permissibility:

1. Intention
2. Infliction of losses on the enemy
3. Frightening them
4. Strengthening the hearts of the Muslims.

These statements, if read by impressionable youth, could certainly be said to be inflammatory so as to fire one's passions with intensity of a dithyrambic nature.

The finding that all of the defendants traveled to Pakistan and thereafter attended a training camp known as al-Farooq in Afghanistan at which Usama bin Laden spoke espousing anti-American sentiment and received training in the use of weapons and lectures on suicide as a means of causing harm to the enemy, causes the following questions to be asked:

(1) How did it come to be that six young men, all in their twenties and all being from Lackawanna, New York traveled in two groups between April 28, 2001 and May 12, 2001 to Pakistan?

(2) Were they recruited by someone to make this trip, and if so, by whom, and on what basis were they selected, and for what purpose?

(3) How is it that six young men from Lackawanna, New

York were allowed entry into Afghanistan since their passports did not indicate that appropriate visas for such entry were issued?

(4) How is it that six young men from Lackawanna, New York were allowed to enter a secret training camp known as al-Farooq in Afghanistan and attend a speech given by Usama bin Laden?

(5) What was the objective in attending said training camp and to what use or purpose was such training to be put?

(6) Why did the defendants Goba, Mosed, Taher, Galab and Al-Bakri remain at the camp for the full training period?

Although the government retains the burden of persuasion, a defendant must introduce some evidence contrary to the evidence proffered by the government in support of its motion to detain. The defendants must come forward with evidence to rebut that of the government. *Chimurenga,* 760 F.2d at 405. *See also Rodriguez,* 950 F.2d at 88; *Martir,* 782 F.2d at 1144.

I find that the defendants in each of their proffers, as well as in the collective proffer made on their behalf, have not come forward with sufficient evidence to offset the government's claims of dangerousness and risk of flight, nor have they presented anything that would constitute reasonable answers to the questions listed above.

As previously stated and reiterated, we cannot abandon the principles established in the United States Constitution when deciding the government's motion to detain. This has not been done, and the defendants, by way of four days of hearing, have received the due process to which they are entitled under the Fifth Amendment as it relates to the issue of bail or detention. However, the United States Constitution does not require that the Court abandon or disregard common sense and the drawing of reasonable inferences based on circumstantial evidence in making its determination.

I have considered each and every one of the factors set forth in 18 U.S.C. § 3142(g), to wit:

> (1) the nature and circumstances of the offense charged. . .;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> (B) whether, at the time of the current offense or arrest,

> the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of sentence for an offense under Federal, state or local law; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

The defendants have attacked the validity of the charge placed against each of them on the ground that 18 U.S.C. § 2339B is unconstitutional because of vagueness and in support of their argument, rely on the decision of the United States Court of Appeals for the Ninth Circuit in *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied* 532 U.S. 904 (2001). In response, the government cites the case of *United States v. Lindh*, 212 F. Supp.2d 541 (E.D.Va. 2002).

Humanitarian is a civil case wherein the plaintiffs sought injunctive relief in the enforcement of § 2339B for fear that their legitimate humanitarian activities would be criminalized by application of the statute. Although the Court of Appeals rejected most of the arguments put forth by the plaintiffs, it did accept the plaintiffs' challenge to the statute on the basis of vagueness, stating:

> It is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term"personnel," as it blurs the line between protected expression and unprotected conduct.

Humanitarian, 205 F.3d at 1137.

Lindh involved a criminal indictment alleging a violation of 18 U.S.C. § 2339B, and in rejecting the defendant's claim that the statute was unconstitutional, the

District Court stated:

> Lindh contends his conduct does not, as a matter of law, amount to providing "material support and resources," including "training" and "personnel," because he provided no training and that merely enlisting in an armed force – rather than recruiting for such a force – does not constitute providing personnel. Lindh is incorrect on both arguments.
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> * * *
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> Thus, to provide personnel is to provide people who become affiliated with the organization and work under its direction: the individual or individuals provided could be the provider himself, or others, or both.

Lindh, 212 F. Supp.2d at 577.

At this stage of the proceeding, and with due respect to the Court of Appeals for the Ninth Circuit, I accept the reasoning of the District Judge in *Lindh* and conclude that one can be found to have "provided material support or resources to a foreign terrorist organization" by offering one's services to said organization and allowing one's self to be indoctrinated and trained as a "resource" in that organization's beliefs and activities. Therefore, for purposes of deciding the government's motion to detain the defendants herein, I reject the contention of unconstitutionality of the statute put forth by the defendants.

As to the defendants Goba, Mosed, Taher, Galab and Al-Bakri, I find that there are no conditions or combination of conditions that I could impose that would reasonably assure the safety of the community and the appearances of the defendants

when required. If the defendants are or have become disciples of al-Qaida and believers in self destruction as a legitimate means of causing harm to others, there are no conditions that could be imposed that would deter such act of self destruction other than detention. For purposes of deciding the issue of detention or bail, and only for that limited purpose, I find that there is sufficient evidence of a clear and convincing nature as to the defendants Goba, Mosed, Taher, Galab and Al-Bakri to consider them a danger to the community and a risk of flight and therefore, as to these defendants, the government's motion to detain is GRANTED.

As to defendant Alwan, I find that he has come forward with sufficient evidence to offset the government's claim of dangerousness and risk of flight so as to prevent me, from a legal point of view, from concluding that there are no conditions or combination of conditions that I could impose that would reasonably assure the safety of the community and his appearance when required. To do otherwise would be intellectually dishonest.

I find that the evidence proffered by the government and the defendant Alwan establishes that this defendant apparently disavowed or disclaimed any continued participation in the activities of al-Qaida when he managed to extricate himself from the al-Farooq training camp and return home to Lackawanna, New York on June 20, 2001. He also appears to have voluntarily cooperated with agents of the F.B.I., made disclosures about his own activities as well as those of the other defendants, and made express statements of disagreement with the beliefs of al-Qaida

and the use of terrorism against inhabitants of this country. Therefore, the defendant Alwan is hereby released on bail subject to the following terms and conditions:

1. The defendant shall post a bond in the sum of $600,000 or, in the alternative, property free and clear of any liens or encumbrances having a value equal to or greater than $600,000 with the agreement and understanding that such bond or property will be forfeited in the event that any one of the conditions herein is substantially violated as determined by the Court.

2. The defendant shall report to the U.S. Probation Office as directed by the U.S. Probation Officer.

3. Travel is restricted to Erie County unless defendant continues in his employment with his present employer. In that event, the defendant shall be allowed to travel to and from such place of employment by a route pre-approved by the U.S. Probation Office.

4. The defendant shall surrender any passport to the Clerk of the Court or the Federal Bureau of Investigation.

5. The defendant shall obtain no new passport.

6. The defendant shall avoid all contact, direct or indirect, with any potential witness in the subject investigation or co-defendants in this case or related

cases unless in the presence of his attorney. Any inadvertent contact must be reported to the U.S. Probation Department within 24 hours.

7. The defendant shall refrain from possessing a firearm, destructive device or other dangerous weapons either directly or indirectly.

8. The defendant shall participate in the following home confinement program and abide by all the requirements of the program which will include electronic monitoring and Global Positioning System. He shall pay all of the costs of the program:

> Home Incarceration: Defendant is restricted to his residence twenty-four hours per day at all times except for medical needs or treatment, court and meetings with his attorney unless he is employed. If employed, he shall be allowed to leave his residence for the sole purpose of reporting to work. The hours allowed for this purpose shall be determined by the U.S. Probation Office.

9. Global Positioning Satellite Monitoring (GPS): The defendant will be monitored by an electric monitoring system which utilizes a Global Positioning Satellite System (GPS) which will monitor the defendant with the use of twenty-four hour satellite. The defendant will pay all costs of the GPS monitoring system.

10. The defendant shall report as soon as possible to the U.S. Probation Office or supervising officer any contact with any law enforcement personnel, including, but not limited to, any arrest, questioning, or traffic stop within 24-hours.

11. The defendant will also be prohibited from possessing or using any cellular phones, public telephones or any other phones, modems, on-line services (including electronic mail), fax machines or pagers.

12. The defendant shall submit to a search of his person, property, vehicle, and place of residence, or any other property under his control, and permit confiscation of any evidence or contraband discovered in accordance with the district-approved search policy.

13. The defendant shall provide the U.S. Probation Office with access to any requested personal and/or business financial information including, but not limited to, authorization to conduct a credit report, or to provide a credit report at the instruction of the U.S. Probation Officer.

14. The defendant shall not possess, purchase, or use a computer or computer equipment, which includes: a modem; Internet account; writable or re-writable CD Rom; tape backup or removable mass storage device; device/appliance that can be used to connect to the Internet; digital camera; Personal Digital Assistant (PDA); and CDs (other than original manufacturer's software distribution). The defendant is prohibited from using any commercial computer systems/services except for employment purposes as approved by the probation officer. If allowed use of a computer for employment, the system shall only contain software required to perform his job. **The U.S. Probation Office shall install a monitoring application on the**

defendant's computer or any other system that may be used to connect to the Internet. The U.S. Probation Office shall randomly monitor the defendant's automated systems.

15. Wire Tap (Telephone Line 1) and Pen Register (Telephone Line 2): The defendant shall have two telephone lines in his residence. One of the telephone lines (line 1) will be subject to recording and monitoring by a company to be approved by the U.S. Attorney's Office and paid for by the defendant. The defendant shall not be permitted to have any access to line one. The second telephone line (line 2) shall be used by the defendant only for attorney calls or to call his pretrial services officer. The conversations on line 2 will not be monitored, however, the U.S. Attorney's Office or a designated law enforcement agency will be permitted to install a Pen Register Device in order to monitor the location of all incoming and outgoing calls occurring on line 2. Any expense incurred will be paid for by the defendant.

No persons other than the defendant, the U.S. Probation Officer and his attorney are permitted to be on line two, nor will the attorneys relay information from third parties unless first approved by the U.S. Attorney's Office.

16. A violation of any condition(s) of your release on bond may result in forfeiture of bail by the United States District Court and cause a bench warrant to be issued.

CONCLUSION

Based on the foregoing, it is hereby ORDERED that the defendants Goba, Mosed, Taher, Galab and Al-Bakri are detained and are remanded to the custody of the U.S. Marshal Service. It is further

ORDERED that the following DIRECTIONS REGARDING DETENTION be implemented:

1. The defendants are committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility, separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal, pending trial of the charges herein against them;

2. The defendants shall be afforded a reasonable opportunity for private consultation with defense counsel; and

3. On order of a court of the United States or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with a court proceeding.

As to defendant Alwan, it is hereby ORDERED that he be released on bail in accordance with the aforesaid conditions of release but such release shall not occur until the United States Probation Office has completed arrangements for the implementation of the Global Positioning Satellite Monitoring and the electronic monitoring system.

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H. KENNETH SCHROEDER, Jr.
United States Magistrate Judge

DATED: October 8 , 2002
Buffalo, New York